In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1051

KARL ANTON POMEROY VON LEWINSKI, PETITIONER,

v.

BYRON V. PEPITONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a holder of dual citizenship in the United States and West Germany,[1] seeks to void an order to report for induction into the United States Army.

The material facts are undisputed. On March 6, 1963, petitioner registered with Selective Service Local Board No. 39 in Fairfax, Virginia. After the local board notified him in November 1968 that he was eligible for induction into the armed services, he asserted that he had relinquished his American citizenship and that, as an alien, he was ineligible for military duty. The local board rejected this assertion on January 14, 1969, and affirmed petitioner's "1-A" classification. On January 29, 1969, the local board ordered petitioner to report for induction. The local board subsequently notified petitioner that his in-

---

[1]Petitioner was born in the United States on February 24, 1945. His mother was a native-born United States citizen and his father was a German alien. Petitioner therefore acquired at birth both American citizenship, under the Fourteenth Amendment, and German citizenship, under German municipal law.

duction was being postponed pending a further examination of his citizenship status. That examination was concluded in January 1971, and on February 2, 1971, the local board again ordered petitioner to report for induction.[2]

Petitioner did not report for induction as ordered, initiating instead the present action in the United States District Court for the District of Columbia seeking, among other things, to void the induction order.[3] Petitioner claimed in his complaint that (a) his taking of an oath of allegiance to the West German Republic in connection with the obtaining of a German passport and (b) his informing United States government officials of his intention to be a German national constituted voluntary acts which unequivocally indicated relinquishment of United States citizenship. The district court granted summary judgment for the government (Pet. App. 26a). The court of appeals affirmed (Pet. App. 30a-32a).[4]

---

[2]Further details are set forth in the Appendix to the petition at pages 20a through 25a.

[3]Although the local board ordered petitioner on February 2, 1971, to report for induction "at the soonest possible time" (Pet. App. 24a), he did not initiate the present action until December 29, 1972.

[4]Petitioner asserted for the first time in his petition to this Court that his relinquishment of American citizenship was also effected under 8 U.S.C. 1481(a)(10), which deals with absenting oneself from or remaining outside of the United States "in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States." Since petitioner has not raised this issue earlier, he should not be permitted to advance it here. See *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the continuing vitality of Section 1481(a)(10) is at best arguable under the present circumstances (see *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144) and the significance, so far as petitioner is concerned, of the fact that Section 1481(a)(10) is expressly limited to wartime and periods of national emergency is unclear. These issues would presumably be dealt with, however, should criminal proceedings against petitioner be initiated.

Petitioner contends that the ruling of the courts below is inconsistent with decisions of this Court as well as with the Ninth Circuit's decision in *King* v. *Rogers*, 463 F. 2d 1188. That contention is incorrect. The fundamental issue in all but one of the cases cited by petitioner was whether particular acts constituted relinquishment of American citizenship. None of those decisions controls the present case, however, since they did not deal with dual nationality problems such as those involved here or the means by which a dual national may voluntarily relinquish American citizenship.

In *Savorgnan* v. *United States*, 338 U.S. 491, naturalization in Italy of a native-born American accompanied by residence in Italy for approximately four years was deemed to constitute a relinquishment of American citizenship. The ruling in *King* v. *Rogers*, *supra*, was to the same effect. In *Perkins* v. *Elg*, 307 U.S. 325, on the other hand, this Court held that residence in a foreign state during minority of a child born of foreign parents in the United States did not, of itself, destroy American citizenship.[5]

In addressing petitioner's claim in the present case that he had effectively relinquished his American citizenship, the court of appeals stated (Pet. App. 32a):

> Neither of the acts which [petitioner] claims constitutes relinquishment of citizenship are necessarily any more than the assertion of his status as a dual national and the exercise of his rights as such. "The mere fact that [a dual national] asserts the rights of one citizenship does not without more mean that he renounces the other." [Citing *Kawakita* v. *United States*, 343 U.S. 717, 724.]

---

[5]The fourth case cited by petitioner, *Rogers* v. *Bellei*, 401 U.S. 815, has no application here since the petitioner in that case was not a Fourteenth Amendment citizen, having instead acquired American citizenship by statute, and the sole issue in the case was whether Congress could condition that statutory grant by requiring a period of residency in the United States.

We submit that the court of appeals was correct in holding that this Court's decision in *Kawakita* v. *United States* is dispositive of petitioner's claim. There, as here, a person with dual citizenship exercised rights of nationality in two countries—including applying for and using a passport proclaiming citizenship in a country other than the United States. This Court held that those acts did not constitute effective relinquishment of petitioner's American citizenship.[6] As noted by the court of appeals in this case, 8 U.S.C. 1481(a)(6) provides a readily accessible means by which petitioner could have relinquished his American citizenship.[6] Instead of complying with the provisions of that section, and explicitly relinquishing his American citizenship, petitioner attempted for almost two years (see n. 3, *supra*) to have it both ways: that is he attempted to avoid one of the responsibilities of American citizenship (military service) while at the same time taking care not to foreclose in the future possibly claiming the benefits of that status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

---

[6] 8 U.S.C. 1481(a)(6) provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State * * * ."